STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EB46AB-61404
EEOC NO. 17E 2010 00239

Elizabeth Hulahan,

Complainant,

v.

The Orange Lantern,

Respondent.

Administrative Action

FINDING OF PROBABLE CAUSE

The Director of the New Jersey Division on Civil Rights (DCR), pursuant to N.J.S.A. 10:5-14 and attendant procedural regulations, hereby finds that probable cause exists to believe that a discriminatory practice has occurred in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. For purposes of this disposition, the Director finds as follows.

Complainant Elizabeth Hulahan is a Paramus resident who began working for Respondent as a server on July 5, 1978. Respondent, the Orange Lantern, is a Paramus sports bar owned and operated by Eugene Faatz. Complainant alleged that she was fired on September 24, 2009, at the age of 66, despite performing her job at a level that met her employer's legitimate expectations, and that after she was fired, Respondent sought or retained younger employees to perform her duties.

Respondent denied the allegations of age discrimination in their entirety. It alleged that it terminated Complainant's employment "because of her extremely bad attitude toward customers and co-workers," and because she was "obstinate and nasty to fellow employees and customers," which resulted in "customer complaints including but not limited to taking their business elsewhere."

The investigation found that Respondent did not tell Complainant that she was being discharged because of her conduct or a poor attitude toward her fellow employees and customers. To the contrary, Faatz wrote a glowing letter of recommendation that attributed his employment decision solely to a "change in operating procedure." In particular, Faatz wrote:

> Betty Hulahan worked for me at the O.L. (Orange Lantern) for about 30 years as a waitress. She was the MOST trusted and MOST reliable employee I have ever had. Only due to a change in operating procedure did I have to make her available to another employer looking for these great qualities. You may call me for any further information that you might require.

Faatz also gave Complainant a check for $5,000 on the day of her discharge.

Respondent did not produce any documents critical of Complainant's performance that were generated prior to her termination. Nor did it provide persuasive evidence that customers were "taking their business elsewhere." Instead, Respondent produced statements from employees and a customer that were critical of Complainant. Those statements were prepared after Respondent became aware of Complainant's allegations of discrimination.

For example, bartender/waitress Alexis Daniel wrote, in part, "Betty was very nasty to the customers and at times pushing them out of the way. Betty was very nasty with all of the staff members as well . . ." Bartender Danielle Rath wrote, in part, "Though Betty had great professional attributes such as punctuality, reliability and honesty, to name a few, her customer service attitude needed a little work. Betty was not 'Betty' when she was at work. She seemed aggravated to be here and annoyed when she had to interact with customers . . ." Bartender Patrick Moynihan wrote, in part, "[H]er attitude at the waitress station was very bad. It would often place the whole staff in a very bad mood. She would walk past customers looking at menus without taking their order. She would walk past customers who had finished eating and wouldn't even consider taking their dirty dishes away . . . Many times customers would come to the bar to order because they

didn't want to deal with her." A customer, Sherri VanDoyne, wrote, in part, "I had a problem in April with her when she took my order for food. When she brought out my food it wasn't right. She yelled at me and said that I ordered it. She made her customers feel like crap. If anyone was in her way, she would scream at you. She would also give me incorrect change. When Betty wasn't yelling or screaming, she would sit down and complain about someone or something." Manager Brenda Brundage wrote, in part:

> I have received various complaints and comments about Betty from customers & staff. But with Betty being at the O.L. for such a long time, it was just the way it was. As Betty's attitude towards staff & customers became increasingly worse, it was time for a change . . . Over the past year, a group of teachers came in & asked, "is that nasty woman still working the tables?" Then, the gentleman who brought the group in said that was why they were sitting at the bar, since their last experience here was terrible at the tables.

Complainant contends that the statements were coerced and unreliable. For example, characterizing the statements as "suspect," Complainant's attorney argues, "It cannot be ruled out that current employees feared reprisal by Respondent and were concerned for their job security if they did not cede to their employer's request for statements critical of Ms. Hulahan." Complainant told DCR that the customer who provided a statement is a "friend of Freddy's," i.e., Assistant Manager Frederick Breiner. Complainant denied behaving in the manner described by the customer.

Complainant's attorney argues that the some of the witness statements reveal an element of age bias, such as Moynihan's description of Complainant as "totally out of touch with the customers and the ongoing [sic] of the bar," and complaint that "[s]imple things like the credit card machine skills, changing the calculator tapes and changing the tv channels to common sports channels were things she did not learn to do," and Rath's claim that Complainant "seemed to have lost . . . ability [to deal with customers] and her patience seemed to be diminishing as every new day went by." Complainant's attorney argues that those "statements smack of 'you can't teach an old dog new tricks' age discriminatory attitude toward Ms. Hulahan."

Complainant stated that although Faatz ordinarily sat at the bar next to the waitress station throughout her shift, he never disciplined, counseled, or corrected her for her supposed bad attitude or deficient work performance. Complainant's attorney argues that if the alleged conduct had actually occurred--and particularly if her conduct was driving away business as Respondent alleges--"certainly [Faatz] would have spoken to [Complainant] about it, yet he never did."

Complainant alleged that during the summer of 2009, she heard Faatz say to a customer, "Yeah! The Old Bitty is still here," referring to her. She alleged that over the next few days, she heard Faatz repeat the "Old Bitty" reference to Assistant Manager Frederick Breiner, in a joking manner. Complainant stated that she reported the derogatory comments to Brundage, but nothing was done.

The investigation found that at the time of Complainant's discharge, there were a number of younger women who were employed at Respondent's establishment, including: Alexis Daniel, 30; Amber Woegns, 24; Jacklyn Leto, 26, hired in August 2009; and Gillian Torres, age 24, who was hired on September 9, 2009, i.e., two weeks before Complainant's discharge.

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified discrimination." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a preliminary determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799; Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978).

The "clear public policy of this State is to eradicate invidious discrimination from the

workplace." Alexander v. Seton Hall, 204 N.J. 219, 228 (2010). To that end, the LAD was enacted as remedial legislation to root out the "cancer of discrimination." Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996). Our courts have adhered to the Legislative mandate that the LAD be "liberally construed," N.J.S.A. 10:5-3, by consistently interpreting the LAD with a "high degree of liberality which comports with the preeminent social significance of its purposes and objects." Andersen v. Exxon Co., 89 N.J. 483 (1982); cf. Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 519 (App. Div.) (noting LAD's protections are broader than other anti-discrimination statutes), certif. den'd, 170 N.J. 211 (2001).

In order to establish a *prima facie* case of discrimination under the LAD, a complainant must provide evidence (1) that he or she is a member of a protected class; (2) that he or she was performing the job; (3) that he or she suffered an adverse employment action; and (4) that the employer sought someone to perform the same work after he or she left. See Reynolds v. Palnut, Co., 330 N.J. Super. 162 (App. Div. 2000); Zive v. Stanley Roberts, 182 N.J. 436, 455 (2005). If the complainant can make that *prima facie* showing, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the action, and once the employer has done so, the employee gets a "fair opportunity to show the employer's stated reason was in fact pretext or that the action occurred under circumstances which give rise to the inference of unlawful discrimination." Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 303 (App. Div. 2000) (internal citations omitted).

In this case, the DCR finds that the then 66 year-old Complainant who, according to initial reports, was terminated "[o]nly due to a change in operating procedure" and who appears to have been replaced by substantially younger workers, has met her *prima facie* case. Respondent presented witness statements to support its assertion that Faatz's employment decision was based solely on legitimate non-discriminatory business reasons. That assertion may ultimately be proven to be true. But at this stage, that explanation is put into question by issues such as Faatz's

contemporaneous letter of recommendation that describes Complainant as the "MOST trusted and MOST reliable employee [he has] ever had," the fact that Complainant appears to have been replaced by individuals who were substantially younger (i.e., Leto and Torres, who were in their twenties and hired shortly before Complainant was fired), the lack of evidence that Faatz ever criticized Complainant or counseled her about any purported problems with her work performance prior to her discharge, and Complainant's allegation that the key decision-maker exhibited a discriminatory animus in the months before her discharge by subjecting her to derogatory age-related comments.

Under the circumstances, the Director is not inclined at this "culling-out" stage of the process to accept Respondent's explanation, and conclude that age discrimination was not a motivating factor in the decision to terminate Complainant's employment. Rather, he finds that there are unresolved issues that should be presented at a hearing where a fact-finder can hear testimony, weigh the evidence, and make an initial recommendation. In other words, on balance, the Director finds that there is a reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that Respondent subjected Complainants to age discrimination in violation of the LAD.

WHEREFORE, it is on this 2 day of JAN., 2014, determined and found PROBABLE CAUSE exists to credit the allegation of age discrimination.

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS